No. 222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA, Administrator d.b.n. of the Estate of JOSEPH KELLY KERR, Deceased,
Petitioner,

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND FOR GRANT OF SAID WRIT.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND FOR GRANT OF SAID WRIT.

Above petitioner, by its attorney, respectfully prays that this Court grant rehearing of its order of October 14th, 1957, (U.S.), and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, in the above entitled case, as prayed for in the petition filed June 25, 1957, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

As substantial grounds available to petitioner although not previously presented, petitioner respectfully shows as additional and material cause for grant of rehearing of the denial of certiorari and issue of writ of certiorari, as follows:

1. A Review by certiorari is sought of the judgment of the Court of Appeals in dismissal of the proceeding, instituted in the United States District Court for the District of Columbia, on the ground that it fails to state a claim upon which relief can be granted. The appellate *per curiam* opinion holds the sole ground for its judgment for dismissal is that the petitioner proceeding seeks only a reaffirmation of the prior judgment and raises nothing not previously litigated and adjudicated between the parties and not therein rendered *res adjudicata* by the previous judgment.[1]

2. Error in the above holding is submitted to be:

(A)—That the prior judgment is not *res adjudicata* of petitioner proceeding.[2]

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[1] The decisive *per curiam* appellate opinion is quoted in the Petition, page 6, and same, with the concurring opinion, appears in full in the Petition Appendix, pages 5a-7a.

[2] The citation, in the *per curiam* opinion, *Jones* v. *United States*, 228 F. 2d 52, 97 U.S. App. D.C. 81, does not support the appellate conclusion of *res adjudicata*. In the Federal courts in New York, the action of Jones et al., v. United States for tort damages caused by reliance in business transactions upon official information furnished to them but erroneous, because of deceit and negligence in its preparation, was finally dismissed for failure to state a claim upon which relief could be granted. The United States District Court in the District of Columbia thereafter granted summary judgment in dismissal of the action of Jones et al. v. United States for damages for negligence in furnishing said er-

(B)—Whether prosecuted as *scire facias* for a new judgment for the unpaid balance of the prior judgment, or as *substantive action* upon the prior judgment for a new judgment for the unpaid balance of the

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roneous information, and the Court of Appeals affirmed on the ground that this second action was barred as *res adjudicata* by the final dismissal of the first action upon the same subject matter in New York, citing *Stoll* v. *Gottlieb*, 305 U. S. 165, 172; therein, in a 77B proceeding in bankruptcy, the federal district court confirmed a proposed reorganization plan, over the objection of some creditors, and as binding upon all creditors, which allowed the substitution of certain corporate stock in substitution for certain bonds and in release of the personal individual guaranty endorsed upon the bonds; Gottlieb, an objecting creditor, after the confirmation order was entered, sued Stoll, as the guarantor upon several bonds, in the Chicago municipal court, and thereafter, in the bankruptcy proceeding, moved for vacation of the confirmation order, and did not appeal from the order that denied his motion. Stoll defended in the action against him that the order of confirmation and the order denying the Gottlieb motion were *res adjudicata* against the Gottlieb claim. The Municipal Court found for Gottlieb, the appellate court reversed, and the Supreme Court of Illinois again reversed, so that the Municipal Court judgment became final, subject to review by the Supreme Court of the United States. Therein, the judgment for Gottlieb was reversed as *res adjudicata* against him as not subject to collateral attack by Gottlieb, who had previously had his day in court and had not appealed the decisions against him.

Petitioner, in its proceeding in the district court, has in no way attacked the finality of the prior judgment, and, instead, has relied upon same as sustaining its claim for relief, consisting of entry of a new judgment against the United States in recovery of the unpaid judgment balance of the prior judgment due to petitioner as a debt of the United States.

Additionally, the right of petitioner in its proceeding below is sustained in *Cromwell* v. *Sac County*, 4 Otto (94 U.S.) 351, 354:

> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or point controverted, upon the determination of which the finding or verdict was rendered.

prior judgment, the relief to petitioner is identical in such proceedings.[3]

[3] Under the prior judgment, petitioner has summary right to forthwith administrative payment of the portion of its excess, if any, over the portion withheld to protect the United States from loss of equivalent existing indebtedness of petitioner to the United States, forthwith to be prosecuted by the United States into final judgment in favor of the United States for set off against the petitioner-judgment, and, thereafter for any excess of the withholding, (and interest thereon), in excess of the judicially determined indebtedness of the petitioner to the United States, and with petitioner not obliged to defend the alleged indebtedness until judicially asserted (*Richmond F. & P. R. Co.* v. *McCarl*, 62 F. 2d 203, 207).

This protection to the United States, after judgment, against loss because of omission to assert a petitioner-indebtedness in the prior litigation, is the response of Congress, in the Act of March 3, 1875, now as amended, the Act of March 3, 1933, (c. 212, Title II, Sec. 13, 47 St. 1516; Petition Appendix, p. 2a), to the ruling of this Court, on February 15, 1875, in *United States* v. *O'Grady's Exrs.*, 22 Wall. 641, 648:

> . . . it is clear that when such a claim as that presented by the claimant in the original petition passes into judgment in a court of competent jurisdiction, it ceases to be open, under any existing act of Congress to revision by any of the executive departments or of all of such departments combined. Remedies such as have been suggested, if reasonable, may be pursued in a proper case, but it will be time enough to decide whether any remedy now remain when the question is properly presented.

Admittedly, a final judgment constitutes a new cause of action, on which the remedies are, first, execution, second, if execution be delayed, an ancillary *scire facias* proceeding, resulting in *a new judgment*, and, third, and action of debt upon the final judgment, also resulting in *a new judgment*. (*Waddell* v. *Cabell*, 21 D.C. 597, 600, Petition, p. 12).

As the United States is not subject to judicial execution it has instead provided its statutory procedure of payment of a final judgment for the recovery of money upon such judgment, and of further payment upon a new final judgment of payment due but not made upon the original final judgment. It follows such new

(C)—The instant decision conflicts with decisions, additional to those of this Court and of the Court of Claims relied upon by petitioner in its Petition.[4]

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted, and that, upon such rehearing, a

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judgment may result from a proceeding by petitioner either by *scire facias* or by action of debt with reference to the original final judgment.

In *Miller* v. *United States*, 160 F. 2d 608, 609, it appears the United States, having a prior judgment as to which its petition for issue of execution was denied, thereafter sued upon the judgment and recovered a second judgment, against which it was defended that the denial of execution was *res adjudicata*, whereof, the opinion holds:

> We do not regard the cause of action for a new judgment as a proceeding in aid of the prior judgment creating the cause of action. Such a cause of action is a substantive right in the United States, not its procedural remedy.

In *United States* v. *Jenkins*, 141 F. Supp. 499, 505, affirmed, 238 F. 2d 83, 84, on the issue whether the United States could by a *scire facias* proceeding revive a dormant judgment, the holding is:

> The *scire facias* proceeding here is a proper civil proceeding to revive a final judgment validly imposed.

In *Raub* v. *Hurb*, 24 App. D.C. 211, 213, the ruling is that a judgment creditor, who is without right to another execution and is so driven either to action of debt upon the judgment, or to *scire facias* for its revival, is nevertheless not precluded from suing in equity for a timely decree in enforcement of the judgment, and such decree is the equivalent of an action at law upon the judgment and affords the debtor-defendant the same opportunity to defend as the action at law would afford.

[4] The foregoing decisions show conflict with the *res adjudicata* conclusion of the present decision in that the necessity for relief surmounts and puts aside technical objections involving the procedure to attain effective relief.

writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

CAMDEN R. MCATEE
Counsel for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to ground specified in Rule 58 of the rules of this Court.

CAMDEN R. MCATEE
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